# In the District Court of the United States for the Northern District of California, Southern Division

Civil No. 2252–S

NORTH COAST TRANSPORTATION COMPANY, A CORPORATION, AND INDEPENDENT STAGES, INC., A CORPORATION, PLAINTIFFS-APPELLANTS

*v.*

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANT-APPELLEES

## MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree of a specially constituted District Court of three judges, established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing a complaint seeking to set aside an order of the Interstate Commerce Commission.[1] Findings of fact, conclusions of law, and final decree were entered by the District Court on May 9, 1944.

[1] The Commission's decision is reported at 41 M. C. C. 269. An earlier report of Division 5 appears at 32 M. C. C. 619.



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The Commission's order, dated October 6, 1942, granted to West Coast Bus Lines, Ltd., hereinafter referred to as applicant, a certificate of public convenience and necessity under Section 207 of Part II of the Interstate Commerce Act (49 U. S. C. 307) to operate as a common carrier by motor vehicle of passengers between San Francisco and Seattle, serving intermediate points. Appellants, who hold authority to operate as passenger carriers by motor vehicle over the portion of this same route between Seattle and Portland, brought suit to set aside the Commission's order insofar as it granted appellant operating authority between those two points. Applicant and certain motor carriers[2] with which it proposed to interchange traffic intervened as defendants.

From the Commission's report, it appears that applicant sought a certificate authorizing operations between Phoenix, Arizona, and Seattle, via Los Angeles, San Francisco, and Portland. This application thus related to operations in four States and under Section 205 (a) of the Act (49 U. S. C. 305 (a))[3] was referred by the Commis-

[2] Burlington Transportation Company, National Trailways System, and Santa Fe Trail Transportation Company.

[3] This Section provides:

"The Commission shall, when operations of motor carriers or brokers conducted or proposed to be conducted involve not more than three States, and the Commission may, in its discretion, when operations of motor carriers or brokers conducted or proposed to be conducted involve more than three

sion for hearing to an examiner rather than to a so-called joint board.[4] The actual proof submitted by applicant at the hearing, however, was confined to that part of the proposed operations between San Francisco and Seattle, and in only three States. Appellants took timely steps before the Commission to assert their contention that since operations in only three, rather than four, States were involved, the matter should under Section 205 (a) have been withdrawn from the examiner and submitted to a joint board. This contention was rejected by the Commission.

On the merits, the Commission's report points out that there is presently a monopoly of bus transportation between Seattle and San Francisco. Between San Francisco and Portland, bus service is furnished only by the Pacific Greyhound Lines,[5] which operates what may be described as a first-class bus service, and its subsidiary,[6] Dollar

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States, refer to a joint board for appropriate proceedings thereon, any of the following matters arising in the administration of this part with respect to such operations as to which a hearing is required or in the judgment of the Commission is desirable: Applications for certificates * * *."

[4] The provisions as to the membership of these boards appear in Section 205 (b) of the Act (49 U. S. C. 305 (b)).

[5] The Southern Pacific Company, whose railroad operates between Portland and San Francisco, owns 39.05 percent of the stock of Pacific Greyhound.

[6] Pacific Greyhound owns 40% of the stock of Dollar Lines, 60% being owned by a Standard Oil subsidiary. Standard Oil sells Pacific Greyhound $600,000 to $700,000 worth of petroleum products annually, and permits Pacific

Lines, which operates what is known as a second-class, low-priced service. Similarly, between Portland and Seattle, service is provided only by appellent North Coast Transportation Company, which conducts first-class bus service, and appellant Independent Stages, Inc., a wholly owned subsidiary of North Coast, which conducts second-class service. Furthermore, because Pacific Greyhound controls Dollar Lines and because North Coast controls Independent Stages, the Commission found that there was no "real independence of action in matters in which those parties would normally be opposed" (41 M. C. C. at 289). These monopoly conditions were found to have contributed materially to certain deficiencies found to exist in the service of the above carriers, such as insufficient schedules, overcrowding, improper equipment, and employee discourtesy. The Commission found also that insufficient and unsatisfactory second-class service was purposely provided in order to discourage the use of such cheaper service and to compel the use of the affiliated higher-priced service. The Commission found that applicant's proposed service was clearly adequate, and promised effective competition with the existing services. In view of the increasing population and increasing bus traffic in the area to be served, as well as the high past

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Greyhound to have a free hand in the management of Dollar Lines.

earnings of the existing operators, the Commission found that the territory involved would support applicant and that its entry into the field would not jeopardize in any degree the existing carriers. On these and other findings, the Commission made the ultimate finding that the present and future public convenience and necessity required applicant's operation between San Francisco and Seattle.

The record before the Commission leading to its order of October 6, 1942, was closed on October 5, 1938. On December 12, 1942, appellants filed a petition for rehearing alleging that certain designated changes in conditions, occasioned in most instances by the war, had occurred since the closing of the record, and offering to submit proof concerning them. In this petition, it was alleged specifically: that under regulations of the Office of Defense Transportation applicant would be unable to secure from that agency the required authority to operate; that under the regulations of that agency and of the War Production Board applicant could not secure the necessary buses, operate the proposed number of schedules, furnish service within the 90-day period it proposed before commencing operations, or meet the time schedules it proposed; that applicant would be unable to secure intrastate rights in Washington and that its operations would thus be limited operations forbidden by Office of Defense Trans-

portation regulations; that existing carriers had reduced their rates and improved their service since the closing of the record; and that by reason of changed conditions affecting operating costs and revenues, applicant could not operate on the basis it proposed without suffering serious financial losses such as to jeopardize its changes of continued operation. Applicant on January 4, 1943, filed an extensive reply to this petition, following which the Commission on February 1, 1943, denied the petition for rehearing.

Appellants made five principal contentions below: (1) that the Commission improperly refused to submit this matter to a joint board for hearing and disposition; (2) that the Commission's report did not contain findings supporting its ultimate conclusions; (3) that the Commission's decision was not supported by the evidence; (4) that the Commission, in authorizing a competitor to operate along their route, deprived appellants of their property without due process of law in violation of the Fifth Amendment; and (5) that the Commission's denial of their petition for rehearing was an abuse of discretion and deprived them of a fair hearing. It is submitted that these contentions present no substantial question and that the decree of the District Court should therefore be affirmed without argument.

1. The Commission did not err under Section 205 (a) in refusing to submit this matter to a

joint board. That Section, previously quoted,[7] requires the Commission to submit certain matters involving operations in not more than three States to a joint board, but does not require such submission where operations in more than three States are involved. Here the application related to operations in more than three States, and was accordingly referred to an examiner rather than to a joint board, but the actual proof related to only three States. The only issue, therefore, is whether the Commission is entitled to determine from the facts shown in the application whether the joint board procedure is required, or whether it must postpone that determination and make it only from the facts as indicated by the proof. That the scope of the proposal, rather than of the supporting evidence, is controlling for this purpose is clearly indicated by the fact that under the language of this Section it is "applications for certificates" which are the "matters" in a case of this type, required under certain circumstances to be submitted to a joint board. The functions of examiners and joint boards are identical,[8] and to refer a matter for hearing to

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[7] See footnote 3, *supra*.

[8] Section 205 (a) provides in part:

"In acting upon matters so referred, joint boards shall be vested with the same rights, duties, powers, and jurisdiction as are hereinbefore vested in members or examiners of the Commission to whom a matter is referred for hearing and the recommendation of an appropriate order thereon * * * (49 U. S. C. 305 (a))."

a joint board which had already been heard by an examiner, merely because there was a variance between the number of States indicated in the application and the proof, would result in senseless duplication of effort. In language expressly approved by the Commission (41 M. C. C. at 270) and the District Court, Division 5 pointed out that appellants' contention "would tend to uncertainty and confusion," and, under the procedure urged, "in innumerable hearings jurisdictional issues, requiring final determination before proceeding, would arise as to whether or not there had been a failure of proof as to a particular State" (32 M. C. C. at 621). Furthermore, the District Court found that there was no fraud, deception, or bad faith on the part of the applicant in making and filing its application for authority to operate in four States. Appellants stated, both at the hearing before the Commission and at the hearing before the District Court, that they made no claim of bad faith.[*]

2. It is plain from the summary above of the Commission's report that the report did contain adequate subordinate findings of fact to afford a rational basis for its ultimate finding that the public convenience and necessity required the granting of this certificate. The question of pub-

[*] Nevertheless, in paragraphs II–IV of their assignments of error, appellants undertake to raise, on appeal, the issue of bad faith.

lic convenience and necessity is one of those ultimate questions of fact entrusted to the expert judgment of the Commission, whose determination with respect thereto will not be disturbed if there is a rational basis for it in the Commission's report. *Chesapeake and Ohio Railway Company* v. *United States*, 283 U. S. 35, 42; *Rochester Telephone Corporation* v. *United States*, 307 U. S. 125, 143–146; *Saginaw Broadcasting Co.* v. *Federal Communications Commission*, 96 F. (2d) 554, 559 (App. D. C.) certiorari denied, 305 U. S. 613; *Davidson Transfer & Storage Co.* v. *United States*, 42 F. Supp. 215, 218 (E. D. Pa.), affirmed, 317 U. S. 587. It is well settled that the Commission may permit new service for the very purpose of giving the public the benefits of competition, as it did here. *Chesapeake and Ohio Railway Company* v. *United States*, *supra*, 41–43; *Indian Valley Railroad Co.* v. *United States*, 52 F. (2d) 485, 487 (N. D. Cal.), affirmed, 292 U. S. 608; *Davidson Transfer & Storage Co.* v. *United States*, *supra*, 219. It is urged that only the ultimate finding of public convenience and necessity is specifically labelled a finding in the Commission's report, but there is no requirement that the Commission's subordinate findings be formal. *United States* v. *Baltimore & Ohio R. Co.*, 293 U. S. 454, 465.

3. Appellants' contention that the Commission's order is not supported by the evidence is

negatived by the express conclusion of the District Court that there was substantial evidence of record sustaining the Commission's order. It is elementary that the weight and credibility of the evidence were for the Commission and that its conclusions must be sustained if supported by substantial evidence. *Western Papermakers' Chemical Co.* v. *United States,* 271 U. S. 268, 271; *United States* v. *Pan American Petroleum Corp.,* 304 U. S. 156, 158.

4. Appellants' argument that the Commission in authorizing competition with them deprives them of their property without due process of law is equally groundless. One holding a non-exclusive certificate of public convenience and necessity, such as appellants hold, has no property right to be free from the subsequent authorization by a government agency of competition. *Indian Valley Railroad Co.* v. *United States,* 52 F. (2d) 485, 487 (N. D. Cal.), affirmed, 292 U. S. 608; *Tennessee Power Co.* v. *T. V. A.,* 306 U. S. 118, 137–139. No reason is apparent why, as appellants urge, a different rule should apply because under regulations of the Office of Defense Transportation the operations of appellant Independent Stages have since the Commission's decision been suspended and its equipment taken over by the parent company, appellant North Coast. As the District Court appropriately observed, "A company whose output is curtailed by rationing

obviously may not on that ground keep competitors out of its field." As it further pointed out, appellants have substantially increased their profits as a result of these joint operations. Consequently, they will be injured even less than they would have been before by the advent of competition.

5. Finally, the Commission, in denying appellants' petition for rehearing to show alleged war-induced changes of circumstances since the close of the record, did not abuse its discretion or deprive appellants of a fair hearing. The District Court, after taking evidence *de novo* on this question, properly concluded that the present situation was essentially different from that in *Atchison, T. & S. F. Ry* v. *United States*, 284 U. S. 249. Here applicant filed a detailed reply to appellants' petition, refuting appellants' speculations and predictions as to the effect of the changed conditions, which reply the Commission had before it when it denied the petition.[10] The alleged changed circumstances, previously detailed herein, are, moreover, quite obviously immaterial. They involve, for the most part, the change that in view of regulations of the Office of Defense Transportation and other defense agencies it

[10] The District Court points out that the Commission took judicial notice that the war existed not only in its decision of October 6, 1942, but also when it denied appellants' petition for rehearing.

would be impossible for applicant to conduct the service as it had proposed, or any service at all. But, as pointed out by the District Court, a rehearing by the Commission would be useless, since it would be impossible for the Commission to predict what action the various war agencies might take with respect to applicant and the commencement of its operations. If applicant is not permitted by the war agencies to operate, appellants will not presently be damaged, because the competition they are attempting to prevent will not come into being. If, on the other hand, applicant's operations are permitted by the war agencies, presumably that will be for the reason that the war effort and the public will be benefited by such operations. In any event, such a decision is one to be made by the appropriate war agencies, and not by the Interstate Commerce Commission.

For the foregoing reasons, it is evident that this appeal presents no substantial questions. It is, therefore, respectfully submitted that the judgment of the District Court should be affirmed.

(Signed) CHARLES FAHY,
Charles Fahy,
*Solicitor General.*

(Signed) DANIEL W. KNOWLTON,
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